88-1366

Supreme Court, U.S.
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No. .....

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

WAYNE A. SIMMONS, JAMES NALLS, THOMAS MILLER, MARK MESKE, CITY OF SANTA BARBARA,
Petitioners,

VS.

IRMA JEAN PEREZ,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In determining the lawfulness, under the Fourth Amendment, of a *Payton v. New York* residential search, does a court look to the officer's objective reasonable belief as to the residence of the warrant suspect, measured by the totality of circumstances known to the officer at the time of the search, or does a court apply an actual facts standard?

2. Can a City be held liable under 42 U.S.C. Section 1983 on the theory that the City was grossly negligent in the training or supervision of its police officers?

LIST OF PARTIES

The caption of the case contains the names of all parties.

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Respondent.

PETITION FOR WRIT OF CERTIORARI

The City of Santa Barbara and the individual defendants (collectively "City"), through the Santa Barbara City Attorney, petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. C) reversing the District Court's judgment is reported at 859 F.2d 1411 (9th Cir. 1988). In an order filed December 21, 1988, the City's Petition for Rehearing was denied. (App. E)

JURISDICTION

The opinion of the court of appeals was filed October 26, 1988. The order denying the City's Petition for Rehearing was filed and entered on December 21, 1988. The

jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the U.S. Constitution provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrant shall issue but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

STATEMENT OF THE CASE

On March 8, 1985, four Santa Barbara City police officers entered the apartment of plaintiff Irma Perez, without a search warrant and without her consent, based on their belief that her brother Albert Perez, the subject of two arrest warrants and on probation for drug-related offenses, was a co-resident of the apartment and was in the apartment at that time. (App. C 3-7)

The plaintiff's first amended complaint contained two causes of action. The first cause of action was directed to the four police officer defendants and alleged that they violated her civil rights by unlawfully searching her apartment without her consent or a search warrant, by falsely arresting her for harboring a felon, and by using excessive force to restrain and arrest her. The second cause of action was directed at the City of Santa Barbara and generally alleged that a policy or custom of inadequate training and supervision of the City was a causal factor of her alleged injuries. (App. A)

Mrs. Perez's lawsuit was tried before a jury. At the close of the plaintiff's case in chief, the court granted the City's motion for directed verdict and dismissed the second cause of action against the City of Santa Barbara. The first cause of action went to the jury on a Special Verdict form and, after deliberations, the jury returned a unanimous verdict concluding that the four police officer defendants had not violated any of the plaintiff's civil rights. The jury did not reach the issues of qualified immunity. Judgments were entered for the defendants. (App. B) (The trial court entered three separate judgments for the various defendants. Defendant Meske was separately represented at trial.)

Mrs. Perez appealed that judgment to the court of appeals, arguing that the trial court had erred in instructing the jury concerning the constitutional standards applicable to a residential search. She also challenged the court's grant of a directed verdict on the issue of municipal liability. The court of appeals reversed and remanded on both issues. (App. C)

The principal issue before the court of appeals concerned the jury instruction to be given regarding a warrantless search of an apartment where the subject of an arrest warrant is believed to be living as a co-resident. More specifically, the dispute centered on how to determine whether a location is a suspect's dwelling place or home for Fourth Amendment purposes. The trial court judge gave the following instruction:

> "Under the Fourth Amendment, an arrest warrant is alone sufficient to authorize the entry into a person's home to effect an arrest. If you find that the police officers had reasonable cause to believe that the plaintiff's apartment was inhabited by Albert Perez at the time of the entry and the search, and they had reason to believe that Albert Perez was within the

apartment, then the entry and search were constitutionally valid.

In determining whether a search is reasonable under the Fourth Amendment, an inhabited residence is a place of occupancy, and is not restricted to a person's permanent home."
(App. C 8-9)

The court of appeals concluded that this instruction gave the jury the erroneous impression that a search warrant was not needed if Albert Perez was "temporarily staying" at his sister's apartment as a "guest" (App. C 9, 11) The court of appeals also held that in determining when the location of the suspect is his home for Fourth Amendment purposes, a court must look to the "actual facts". The court of appeals specifically stated that:

"Unless a jury finds that Albert was an actual co-resident of the apartment. . .the search was in violation of Irma Perez's constitutional rights."
(App. C 14).

In the Petition for Rehearing (App. D) the City did not seek reconsideration of the holding that the trial court's definition of a "home" for Fourth Amendment purposes was erroneous. Rather, the Petition questioned the correctness, under the Fourth Amendment, of the "actual facts" probable cause standard that the court of appeals adopted in its opinion and directed be applied on remand. The City argued that an objective reasonable belief test, which considers the totality of circumstances known to the officers *at the time of the search*, is the only proper probable cause standard (App. D 2-8). The court of appeals denied that Petition. (App. E)

REASONS FOR GRANTING THE PETITION

I

The National Significance of this Fourth Amendment Issue Justifies the Court's Intervention at this Stage of the Litigation.

This case provides the Court with the opportunity to clarify its holding in *Payton v. New York*, 445 U.S. 573 (1980), resolve a conflict between circuits, and clearly establish the applicable standard for courts to use in determining when a location is a suspect's home for Fourth Amendment purposes.

The court of appeals stated below that:

> "In this case, we are faced with a situation which falls between *Steagald* and *Payton*. The officers had an arrest warrant for Albert Perez. They could have legally entered his home to seize him. Yet they used it to enter the home of his sister, Irma, on the apparent belief that Albert had been staying there . . .".
> (App. C 10)

In *Steagald v. U.S.*, 451 U.S. 204 (1981), this Court held that absent exigent circumstances or consent, law enforcement officers could not legally search for the subject of an arrest warrant in the home of a third party, without first obtaining a search warrant. One year earlier, in *Payton v. New York*, 445 U.S. 573 (1980) this court stated that:

> "An arrest warrant . . . carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."
> *Id.*, at 603

In neither *Steagald* nor *Payton*, or since, has this Court addressed the issue of what probable cause standard is to be applied with respect to the determination of when a suspect is living in a third party dwelling. In addition, there is the specific question of what "facts" a court looks at in making that determination of when a suspect's location is his dwelling place or home.

The latter legal issue is squarely presented by this lawsuit. A trial has been held, and the record is complete. In the instant case, the officers believed that the arrest warrant suspect, Albert Perez was living in, or staying at, his sister's apartment as a co-resident. (App. C 3-6) The court of appeals has held, however, that on remand probable cause is not to be determined on the officers objective reasonable belief as to the residence of Albert Perez at the time of the search, but on what are determined afterward to have been the "actual facts". (App. C 14)

A. The Issue's National Significance

This question deserves immediate attention because of its national importance. The issue arises each day in the federal and state courts of this land: In the criminal courts, the issue arises at suppression hearings. In civil damages cases it arises when it is alleged that law enforcement officers have violated a plaintiff's civil rights because they did not have probable cause to believe that the subject of the arrest warrant resided at the home that they searched. Each day criminal and civil courts are faced with the issue: was the third party residence searched pursuant to an arrest warrant, and without the benefit of a search warrant, also the dwelling place or home of the arrest warrant suspect? Stated in other terms, was the warrant suspect a "co-resident" for Fourth Amendment purposes?

In *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979) this Court recognized that although the general principles applicable to claims of Fourth Amendment violations are well settled, litigation to suppress relevant evidence continues to occupy a great deal of the time of both the federal and state judiciary. Although this often occurs because of the difficulty of applying those Fourth Amendment principles to the facts in individual cases, it may occur because the principle is unclear. This is such a case. Two courts of appeal have reached opposite results using the same language from this Court's opinion in *Payton*. Unless that conflict is corrected, by a clarification of the Fourth Amendment probable cause test required by *Payton* and *Steagald*, suppression motions and cases will be wrongfully decided, with untold and irreversible damage to the parties affected.

B. There Is a Conflict Between the Circuits On This Issue

The Ninth Circuit's opinion in this case conflicts with the rule applied in another circuit, and with the most respected constitutional scholars.

In the case of *U.S. v. DeParias*, 805 F.2d 1447 (11th Cir. 1986), the Eleventh Circuit was confronted with the issue of whether the search of a third party's home for arrest warrant suspects violated the third party's Fourth Amendment rights. That circuit applied a reasonable belief, not actual facts, probable cause test and held that the third party's rights were not violated where the officers reasonably believed that the defendants resided in the home *and* were there at the time of search. *Id.*, at 1457.

The nation's leading scholar and commentator on Fourth Amendment search and seizure issues has argued for the probable cause standard followed by the Eleventh

Circuit in *DeParias*; and advocated by this Petition. In his treatise, Professor LaFave exhaustively examined the *Steagald* and *Payton* decisions, and the numerous issues raised by those opinions. He has specifically stated, with reference to the particular issue raised by this Petition, that:

> "With *Payton* requiring an arrest warrant for "entry into a suspect's home" to arrest and *Steagald* requiring a search warrant where the arrest entry is at "the home of a third party", doubtless there will sometimes arise the question of which situation obtains in a particular case . . . when this issue is raised on a subsequent motion to suppress, objecting that a search warrant rather than an arrest warrant was required, surely it ought not be resolved on the basis of information *then* available showing the premises entered were not *in fact* the residence of the person sought to be arrested. Rather, in such circumstances the matter to be decided is whether the entering officers reasonably believed that the place entered was the residence of the person named in the arrest warrant, for were it otherwise the police would be caught in an incredible Catch 22 situation."

LaFave, *Search and Seizure*, (2d Ed.) Section 6.1(b), pages 577-578.

C. *Payton v. New York* Needs to Be Clarified

The problem presented by this petition stems from language in *Payton v. New York*, 445 U.S. 573 (1980) that needs to be clarified. Therein, this Court stated that:

> "An arrest warrant carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within". *Id.*, at 603

Since the "reason to believe" language above expressly refers only to whether the suspect is within the dwelling, and not to whether the suspect lives there, the Ninth Circuit concluded that *Payton* requires an actual facts probable cause test on the issue of residence. As the court of appeals stated:

> "*Payton* allows entry into the suspects *actual* home to execute an arrest warrant for the suspect. *See Payton,* 445 U.S. at 603 . . ."
> (App. C 11)

> ". . . if Albert did not actually reside in the apartment, the search was illegal under *Steagald*".
> (App. C 10)

It is the City's submission that the absence of "reason to believe" language in *Payton v. New York* did not impose an adoption by this Court of a post-search, "actual facts" test of whether the place where an arrest warrant suspect is found is his "home". If the City's submission is correct, then this Petition offers this Court the important opportunity to clarify this issue and resolve the conflict between the circuits.

II

THIS COURT HAS TRADITIONALLY APPLIED A TOTALITY OF CIRCUMSTANCES, OBJECTIVE REASONABLE BELIEF TEST TO FOURTH AMENDMENT SEARCH & SEIZURE ISSUES.

In numerous context with respect to probable cause issues, this Court has looked to the totality of circumstances and objective reasonable belief of the law enforcement officer at the time of the event, not thereafter. This is true with respect to the probable cause necessary for a search warrant based on information from an informant, *see Illinois v. Gates*, 426 U.S. 213 (1983); the validity of a

search, pursuant to an over broad search warrant, of the wrong apartment, *see Maryland v. Garrison*, 107 S.Ct. 1013 (1987); the probable cause necessary for a misdemeanor arrest, *see Michigan v. DeFillippo*, 443 U.S. 1, 36 (1979); and the validity of the arrest, without a warrant, of the wrong individual, *Hill v. California*, 401 U.S. 797 (1971). Similarly, in suppression hearing cases involving the search of automobiles and luggage, where the issue is whether the exigent circumstances exception to the Fourth Amendment warrant requirement is applicable, this Court has held that the existence of exigent circumstances must be assessed at the point immediately before the search. *See U.S. v. Chadwick,* 433 U.S. 1, 13 (1977); *Arkansas v. Sanders*, 442 U.S. 753, 764 (1979).

This Court has also adopted a totality of circumstances test to Fourth Amendment seizure issues, such as the use of deadly force. *See Tennessee v. Garner,* 471 U.S. 1 (1984).

It is the City's submission that this same reasonable belief test should apply to residential searches under *Payton* and *Steagald.*

III

AT A MINIMUM, THIS PETITION SHOULD BE HELD BECAUSE OF PENDING CASES RAISING SIMILAR QUESTIONS UNDER 42 U.S.C. SECTION 1983.

The second question presented by this Petition raises the issue of whether a City can be held liable under 42 U.S.C. Section 1983 on the theory that the City was grossly negligent in the training and supervision of its officers. Related issues are presently pending before this Court in the cases of *City of Canton v. Harris*, #86-1088

and *DeShaney v. Winnebago County Department of Social Services*, #87-154.

Accordingly, the City would request that this Court hold this Petition, as to the second question, until such time as decisions are rendered in *Canton* and *DeShaney*. *See generally Keney v. New York*, 388 U.S. 440 (1967).

IV

CONCLUSION

The City respectfully asks this Court to grant the Petition as to the Fourth Amendment question presented, or in the alternative, to hold this Petition until decisions are rendered in *City of Canton v. Harris*, #86-1088 and *DeShaney v. Winnebago County*, #87-154.

Respectfully submitted,

STEVEN A. AMERIKANER,
City Attorney

By: DAVID K. HUGHES,
Assistant City Attorney

APPENDIX A

APPENDIX A

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83 7492 KN (Kx)
AMENDED COMPLAINT FOR
VIOLATION OF FEDERAL
CIVIL RIGHTS
42 U.S.C. §§ 1983 and 1988

PLAINTIFF'S JURY DEMAND

IRMA JEAN PEREZ,
Plaintiff,

VS.

WAYNE A. SIMMONS; JAMES NALLS;
THOMAS MILLER; MARK MESKE; AND
THE CITY OF SANTA BARBARA,
Defendants.

Plaintiff alleges:

First Cause of Action
(Against Defendants Simmons, Nalls, Miller and Meske)

1. At all times mentioned, plaintiff was and now is a citizen of the United States, residing in the County of Santa Barbara, in the State of California.

2. This is an action at law for money damages brought under 42 U.S.C. §§ 1983 and 1988 to redress a deprivation under color of state law of rights, privileges and immuni-

ties secured to plaintiff by said statutes and by the First, Fourth, Eighth and Fourteenth Amendments of the United States Constitution. The jurisdiction of this Court is invoked under said statutes and amendments and under 27 U.S.C. §§ 1343 and 1331.

3. At all times herein mentioned, defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske, and each of them, were duly appointed and acting police officers employed as such by the City of Santa Barbara, State of California, and were acting under color of state law, in concert, unlawfully and to the injury of plaintiff as hereinafter alleged.

4. The events, acts and omissions herein complained of occurred on or about March 8, 1983, commencing at approximately 1:00 p.m., at 13 South Soledad Street, Apt. 3, Santa Barbara, California, where plaintiff was in her home, peacefully minding her own business.

5. At said place and time, defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske knowingly and willfully deprived plaintiff of the *rights of speech and privacy, of security in her home and person* from unreasonable search and seizure and unjustified force and bodily injury; *freedom from false arrest and imprisonment; freedom from cruel and unusual punishment; and the right to due process of law,* guaranteed by the First, Fourth, Eighth and Fourteenth Amendments to the United States Constitution, by entering plaintiff's home by force and violence; by forcibly preventing her from telephoning the police department for assistance and protection; by assaulting, beating and handcuffing plaintiff with excessive force; by searching and disrupting her home; by calling plaintiff an unfit mother in the presence of her 5-year-old daughter and threatening to take her daughter away from her; by telling her she was under arrest for assaulting an officer (a charge later

changed to another alleged violation, and then dropped); by taking her with unnecessary force and violence and in handcuffs, not to the county jail for immediate booking, but to the Santa Barbara Police Department for questioning; and after humiliating and painful delay, taking her, again in handcuffs, to the county jail, and booking her on the charge of harboring a felon, which charge, though unfounded, tended to cover up and seemingly justify said defendants' assault upon plaintiff while diminishing the credibility of plaintiff's complaint that illegal force had been used upon her and her house illegally entered. When plaintiff was required to and did appear in court for arraignment on this charge, on about March 18, 1983, there was no complaint on file against her, it appearing (as plaintiff is informed and believes) that said defendants were afraid to file the charge and subject it to the scrutiny of the Santa Barbara County District Attorney's Office, or that they did so, and the District Attorney rejected it, although not until after plaintiff had been subjected to substantial risk, humiliation and damages, as set forth below.

6. As a direct and proximate result of said acts of said defendants, and each of them, plaintiff suffered great physical and mental pain, shock to her nervous system and body, anguish, torment, anxiety, humiliation, severe depression and emotional distress, all of which injuries have caused and continue to cause plaintiff great mental, physical and nervous pain and suffering. Plaintiff is informed and believes, and on that ground alleges, that these injuries will result in some permanent disability to plaintiff, all to her general damage in the sum of $300,000.

7. As a further proximate result of said acts of said defendants, and each of them, plaintiff was required to and *did employ a doctor to treat and care for her, and incurred medical and incidental expenses.* Plaintiff is in-

formed and believes, and on that ground alleges, that as a further proximate result of said acts of defendants, she will be required to incur further such expenses in the future. The exact amount of such expense is unknown to plaintiff at this time.

8. Said acts of defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske were committed by them knowingly, willfully and maliciously, with the intent to vex, annoy, harass and oppress plaintiff and to cause her physical and mental injury and suffering and the loss of her aforesaid constitutional rights; and by reason thereof, plaintiff requests that said defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske be required to pay damages by way of example and punishment in an amount not to exceed $500,000.

9. By reason of said acts of said defendants, plaintiff was required to retain a lawyer to institute and prosecute this action, and to render legal assistance to plaintiff in vindicating the loss and impairments of her rights as set forth above; by reason thereof, plaintiff requests payment by said defendants of a reasonable sum for attorney fees pursuant to 42 U.S.C. § 1988.

Second Cause of Action
(Against Defendant the City of Santa Barbara)

1. Plaintiff here refers to Paragraphs 1 to 5, inclusive, of her foregoing first cause of action and incorporates the same herein by reference as if here set forth in full.

2. At all times herein mentioned, defendant the City of Santa Barbara was, and is, a charter city of the State of California, and had the authority to investigate, test, evaluate, employ, train, supervise, discipline, assign and discharge sworn personnel of the Santa Barbara Police

Department, including defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske.

3. At and before the events alleged in this complaint, the governmental *policies and customs* of said City with respect to the operation of the Santa Barbara Police Department included the following:

a. In deciding whether to hire a person applying for employment as a police officer:

(i) Not to obtain from the applicant or from other law enforcement agencies which had previously employed the applicant as an officer information regarding complaints against the applicant for allegedly making unlawful, forcible and warrantless entries of residential premises, for making unlawful arrests in connection with such illegal entries or searches, or for using unprovoked, unnecessary or excessive violence; if such data was received, to make no meaningful examination or evaluation of it, and to make no independent inquiry concerning the facts underlying any such complaints; and,

(ii) To refrain from administering psychological tests of sufficient efficacy to screen out applicants having a propensity for unprovoked, unnecessary or excessive violence; and not to require any special psychological testing or counseling for any applicant who had accumulated a significant number of such complaints within a particular time period, regardless of whether such complaints were classified by the previous employer as substantiated.

b. In supervising, training or assigning duties to a person employed as a police officer:

(i) With respect to officers against whom complaints were made in their prior or current employment for allegedly making unlawful, forcible and

warrantless entries of residential premises, for making unlawful arrests in connection with such illegal searches, or for using unnecessary force in making arrests, not to require special training, testing, supervisory attention, reports and reevaluations of job performance regarding illegal searches, improper arrests or use of force;

(ii) To permit Santa Barbara police officers to search private residences by forcible entry and without a warrant, in the absence of exigent circumstances and where a warrant could be sought, on the sole ground that the officers were looking for a person for whom a felony warrant had been or was believed to have been issued, where the person sought did not reside at the premises to be searched, and where the officers had not verified the presence of such person on said premises at the time of the search;

(iii) Not to make any meaningful investigation of complaints against Santa Barbara police officers alleging the warrantless, forcible, unlawful searching of private homes; unlawful arrests; or unnecessary force in making such arrests, and not to rebuke or discipline officers for doing those things, so long as such actions resulted in the discovery of information or evidence which, in the opinion of the Santa Barbara Police Department, "incriminated" someone;

(iv) With respect to written police reports reflecting the entry of private homes by police officers without search warrants, to make no meaningful inquiry or follow- up investigation to determine: whether such entry was made over the objection or protest of the homeowner or occupant(s), or made under exigent circumstances justifying a warrantless search; and whether the officers involved needed

further training or retraining concerning constitutional provisions and other rules requiring warrants and exigent circumstances justifying warrantless searches;

(v) To refrain from indoctrinating Santa Barbara police officers to report promptly and fully any instances of unlawful, forcible, warrantless searches of homes, false arrest or unnecessary use of force by fellow officers, and to refrain from providing police officers with written guidelines or policy statements requiring them to do so, but instead to countenance and tacitly to encourage the non-reporting of such incidents;

(vi) Not to train or indoctrinate officers to intervene forcibly to prevent the violation of California Penal Code Section 149 by a fellow officer against a person being searched, interviewed, detained or arrested by such officer;

(vii) Not to train or indoctrinate Santa Barbara police officers to intervene forcibly to prevent the unlawful, forcible, warrantless search of a private home in contravention of the Fourth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983;

(viii) To refrain from providing Santa Barbara police officers with written guidelines or policy statements, and to refrain from formulating and advising officers of any departmental policy concerning the warrantless entry or search of a private residence over the objection of the homeowner or other occupant, constitutional provisions and other rules concerning warrants, and exigent circumstances justifying warrantless searches; and,

(ix) To refrain from providing Santa Barbara police officers adequate training or retraining concerning the warrantless, forcible search of a private residence over the objection of the homeowner or other occupant, particularly concerning exigent circumstances justifying a warrantless search, and constitutional provisions and other rules requiring warrants.

4. As a proximate result of said governmental policies and customs of defendant the City of Santa Barbara, and each of them, defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske, and each of them, were hired and continued to be employed and assigned to duties as police officers by said City on and prior to March 8, 1983, despite, as plaintiff is informed and believes and upon that ground states, incidents and complaints of illegal residential searches, false arrests and unnecessary force on the part of each of them in their prior employment as law enforcement officers or during their employment as Santa Barbara police officers. As a further proximate result of said governmental policies and customs, and each of them, the inquiries, tests, investigations and supervisorial evaluations, each of which would routinely have detected such propensities and led to their correction or to the reassignment or termination of employment of said officers, did not occur; said officers were not provided with written guidelines concerning residential searches or warrantless entries, trained, retrained, reassigned or inhibited in any way from imposing said search, arrest and unnecessary force and violence on plaintiff; said officers were permitted and encouraged, tacitly or overtly, to make warrantless searches of private residences, by force, or over the objection of the homeowner or other occupant, in accordance with their own discretion or impulse in searching for persons for whom an arrest warrant had been issued

or was believed to have been issued, and to retaliate against an objecting homeowner or other occupant by unfounded arrest and unnecessary violence; and plaintiff suffered and sustained all of the damages and injuries hereinbelow set forth.

5. As a further direct and proximate result of such governmental policies and customs of defendant the City of Santa Barbara, and each of them, plaintiff Irma Perez suffered the forcible, unlawful, warrantless search of her home over her objections, the disruption of her household, was prevented from summoning police assistance, was physically restrained in her house, and then unlawfully arrested, handcuffed, threatened, insulted, humiliated, falsely imprisoned and subjected to a pointless and illegal criminal prosecution, and sustained the damages and injuries hereinbelow set forth.

6. As a direct and proximate result of said governmental policies and customs of defendant the City of Santa Barbara, and each of them, plaintiff suffered great physical and mental pain, shock to her nervous system and body, anguish, torment, anxiety, humiliation, severe depression and emotional distress, all of which injuries have caused and continue to cause plaintiff great mental and physical pain and suffering. Plaintiff is informed and believes, and upon that ground alleges, that these injuries will result in some permanent disability of plaintiff, all to her general damage in the sum of $300,000.

7. As a further proximate result of said governmental policies and customs of defendant the City of Santa Barbara, and each of them, plaintiff was required to and did employ a doctor to treat and care for her, and incurred medical and incidental expenses. Plaintiff is informed and believes, and upon that ground alleges, that as a further proximate result of said governmental policies and customs of defendant the City of Santa Barbara,

and each of them, she will be required to incur further such expenses in the future. The exact amount of such expense is unknown to plaintiff at this time.

8. As a further direct and proximate result of said governmental policies and customs of defendant the City of Santa Barbara, and each of them, plaintiff was required to retain a lawyer to institute and prosecute this action, and to render legal assistance to plaintiff in vindicating the loss and impairment of her rights as set forth above; by reason thereof, plaintiff requests payment by said defendant of a reasonable sum for attorney fees pursuant to 42 U.S.C. § 1988.

WHEREFORE, plaintiff prays for judgment against defendants as follows:

1. For general damages in the amount of $300,000;

2. Doctor, medical, x-ray, pharmaceutical and incidental expenses as proved;

3. Punitive and exemplary damages, against defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske only, in an amount not to exceed $500,000;

4. Reasonable attorney fees under 42 U.S.C. § 1988;

5. For her costs of suit herein; and,

6. For such other, further or different relief as to the Court seems proper.

DATED: February 16, 1984.

JOHN M. SINK, Lawyer for Plaintiff

PLAINTIFF'S JURY DEMAND

Plaintiff hereby demands a trial by jury with respect to all counts.

Dated: February 16, 1984.

JOHN M. SINK, Lawyer for Plaintiff

APPENDIX B

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NO. 84-7492 JGD

JUDGMENT

IRMA JEAN PEREZ,
Plaintiff,

vs.

WAYNE A. SIMMONS, et al.,
Defendants.

Filed: September 29, 1986

This action came on for trial before the court and a jury, the Honorable John G. Davies, district judge, presiding. At the close of the plaintiff's case, defendant City of Santa Barbara moved for a directed verdict as to the claim against defendant City of Santa Barbara contained in plaintiff's second cause of action. Good cause appearing therefor,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action against the defendant City of Santa Barbara be dismissed on the merits, and that the

defendant City of Santa Barbara recover of the plaintiff its costs of action.

Dated at Los Angeles, California, this 29th day of September, 1986.

JOHN G. DAVIES
U.S. District Judge

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DAVID K. HUGHES
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UNITED STATES DISTRICT COURT
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IRMA JEAN PEREZ,
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WAYNE A. SIMMONS, et al.,
Defendants.

Filed: September 29, 1986

This action came on for trial before the court and a jury, the Honorable John G. Davies, District Judge presiding. The issues having been duly tried on the plaintiff's first cause of action, and the jury have duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants Simmons, Nalls, Miller and Meske recover of the plaintiff their costs in this action.

Dated at Los Angeles, California, this 29th day of September, 1986.

JOHN G. DAVIES
U.S. District Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NO. 83-7492 JGD

JUDGMENT

IRMA JEAN PEREZ,
Plaintiff,

vs.

WAYNE A. SIMMONS, et al.,
Defendants.

Filed: September 29, 1986

This action came on for trial before the Court and Jury, the Honorable John G. Davies, District Judge, presiding. The issues having been duly tried on the Plaintiff's First Cause of Action, and the Jury have duly rendered its Verdict,

IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing, that the action be dismissed on the merits, and that Defendant, MARK MESKE, recover of the Plaintiff his costs in this action.

Dated at Los Angeles, California, this 29th day of September, 1986.

JOHN G. DAVIES
U.S. District Judge

APPENDIX C

IRMA JEAN PEREZ,
Plaintiff-Appellant,

v.

WAYNE A. SIMMONS; JAMES NALLS; THOMAS MILLER; MARK MESKE; and CITY OF SANTA BARBARA,
Defendants-Appellees.

No. 86-6663.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted March 7, 1988.
Decided Oct. 26, 1988.

Apartment resident brought civil rights action against city and police offices who searched the apartment for person for whom they had an arrest warrant. The United States District Court for the Central District of California, John G. Davies, J., directed verdict in favor of city and entered judgment on jury verdict in favor of police officers, and apartment resident appealed. The Court of Appeals, Hug, Circuit Judge, held that: (1) police did not have the right to enter apartment to execute arrest warrant merely because the subject of the warrant sometimes stayed in the apartment, and (2) apartment resident presented sufficient evidence from which liability of city could be established.

Reversed and remanded.

1. Arrest 68.5(6)

If person whom police sought to arrest had been an actual coresident in apartment, search based on arrest warrant would have been legal, as arrest warrant would have authorized entry into the suspect's home even if it was shared by others but, if arrestee did not actually reside in the apartment, search of the apartment based on the warrant was illegal.

2. Searches and Seizures 25

For purposes of determining the Fourth Amendment rights of a homeowner, a dwelling is not to be considered the home of everyone who happens to be staying there. U.S.C.A. Const.Amend. 4.

3. Arrest 68.5(1)

For purposes of determing apartment resident's Fourth Amendment rights with respect to entry by police officers, her residence could not be considered the home of person who the police sought to arrest if he did not permanently reside there. U.S.C.A. Const.Amend. 4.

4. Civil Rights 13.7

City may be held liable under federal civil rights statute for constitutional violations by its police officers only if the violation results from a municipal policy or custom. 42 U.S.C.A. § 1983.

5. Civil Rights 13.7

To establish municipal civil rights liability, plaintiff must not only establish gross negligence in training but also must demonstrate an affirmative causal link between the inadequate training and the constitutional deprivation. 42 U.S.C.A. § 1983.

6. Civil Rights 13.13(3)

Finding of municipal liability for search of apartment could be supported by evidence that city had no written guidelines on searching a third person's home for a suspect and testimony of officers that, as a result of their training and indoctrination as to police department policy, they believed that the search of a third party's home was legal if the subject of an arrest warrant was temporarily staying at the residence. 42 U.S.C.A. § 1983.

John M. Sink, Santa Barbara, Cal., for plaintiff-appellant.

David K. Hughes, Asst. City Atty., and Kristofer Kallman, Santa Barbara, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before HUG, ALARCON and KOZINSKI, Circuit Judges.

HUG, Circuit Judge:

Plaintiff Irma Perez brought this section 1983 action against the City of Santa Barbara and certain police officers alleging that the officers violated her constitutional rights by entering her house unlawfully in search of her brother. The district judge granted a directed verdict in favor of the City, and a jury found in favor of the remaining defendants. In this appeal, Perez alleges error in the jury instructions and error in granting the directed verdict. We have jurisdiction under 28 U.S.C. § 1291 (1982). We reverse.

FACTS

On March 8, 1983, Irma Perez was living in a three-bedroom apartment at 13 South Soledad Street, in Santa Barbara, California. She had lived there over three years with her children.

Irma Perez had a brother named Albert who, Irma testified, never lived in her apartment. Albert was on probation and also had warrants outstanding for his arrest. Officers Nalls, Simmons, and Miller of the Santa Barbara Police Department narcotics detail were aware of the arrest warrants. Between October and December of 1982, the officers went three or four times to the residence of Albert's other sister, Debbie, to contact Albert. Debbie

lived across town from Irma on Bath Street. This was the residence address that Albert had given to the police when he was arrested on August 21, 1982, and this was the address used by the probation department. When the officers spoke with Debbie on those occasions, they informed her of the warrants for Albert's arrest. She informed them that Albert was not residing there any longer and she did not know where he was living.

In the early afternoon of March 8, 1983, the three officers were driving in an unmarked vehicle on Carpinteria Street and approached the intersection of South Soledad Street. They spotted Albert Perez walking toward them on Soledad Street, in the same block where Irma Perez lived in the apartment complex. When Albert saw them, he immediately turned and headed in the direction of the apartment. Detective Miller got out of the car while the others drove to a parking place. The three then walked through the apartment complex but saw no trace of Albert.

Sergeant Nalls then recalled that he had participated in an arrest of Albert Perez in July of 1980 on Soledad Street in front of the same complex. He further recalled that, at that time, a relative of Albert's named Irma Perez was living in the complex, but he could not remember which apartment she lived in. Additionally, Detective Miller remembered that in early 1982, he had talked to Albert in this area. At that time, Albert said he was residing at the complex (according to Detective Miller's testimony).

Not knowing which apartment Irma Perez lived in, the three officers radioed the police dispatcher, asking for the address that was marked on Albert Perez's 1980 arrest report. Because the dispatcher was unable to assist, the officers drove to a nearby telephone and called the Santa Barbara Sheriff's narcotics detail to obtain the address.

Simmons was told that the address was apartment number 3 at 13 South Soledad Street. While driving back to the apartment complex, a detective's message came over the radio. Sergeant Nalls testified that he interpreted the detective to have said that Albert lived in Apt. 3.[1] When the officers asked the dispatcher to cross-index the address, the dispatcher informed them that Irma Perez lived at apartment 3.

The officers planned to search the apartment and radioed for assistance from a uniformed officer. As they were waiting for the backup car, Detective Miller observed a Mr. William Roberts exit the complex. Detectives Miller and Simmons knew Roberts, since they previously had arrested him. Detective Miller approached Roberts and asked which apartment Albert Perez lived in. According to Detective Miller's testimony, Roberts responded that Albert lived in Apt. 3, and when asked if that was Irma's apartment, Roberts responded that it was. Detective Miller also testified that he asked Roberts if he had seen Albert recently, and Roberts replied that he had not. Roberts' testimony conflicted with Miller's; Roberts testified that he told the officers Albert did not live there, but that he had seen Albert walking down the street five or ten minutes earlier.

When the uniformed police officer — Officer Meske — arrived, all four officers went to Apt. 3 intending to apprehend Albert, though they had no arrest warrants with them. Detective Simmons' testimony at trial indicated that the officers believed Albert was staying at Irma's apartment. Sergeant Nalls testified that he did not check with any city agency to determine whether

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[1]The conversation was recorded on a dispatcher tape; however, the tape is muffled and does not clearly reveal the detective's precise words.

the apartment was listed to anyone in addition to Irma Perez. Indeed, the defendants do not now claim that any such check was made. Sergeant Nalls testified at trial that the idea of obtaining a search warrant to search Irma Perez's apartment "just didn't occur to [him]."

Sergeant Nalls went to the rear of the apartment, and the other three officers went to the front door, knocked, and stated that they were police officers looking for Albert Perez, that they believed he was in the apartment, and that they had a warrant for his arrest. They then requested consent to search. Detective Miller testified that Irma Perez opened the door and stated that Albert was not there, did not live there, and had never lived there. She demanded to see the arrest warrant. When the officers failed to produce it, she refused to consent to a search and began closing the door. At that point, Detectives Simmons and Miller shoved open the door and all of the officers entered.

The three plainclothes officers went upstairs and Officer Meske stayed downstairs. Irma Perez testified that after some conversation between her and Officer Meske, Officer Meske grabbed her from behind, threw her into a wooden rocking chair, and pinned her down with one knee on her leg and both of his hands on both of her wrists. She further testified that after approximately 30 seconds he let her up.

The officers did not find Albert Perez in the apartment. When the officers were on their way out of the apartment, Irma went to the telephone in the kitchen and dialed 911. She told the dispatcher that she wanted to "speak to somebody about policemen harassing me. . . ." The dispatcher told her to call the non-emergency number for the police. When she was about to make a second call, one of the officers cut off the call by depressing the receiver. Perez testified that she threw the telephone to the floor in

anger. She was then spun around, thrown against the wall, handcuffed and told she was under arrest for harboring a fugitive.

Perez testified that she was led out the door in front of gathering neighbors to the police car, and was thrown into the vehicle with such force that her right shoulder slammed against the door frame, causing her pain. Irma was first taken to the Santa Barbara police station, and then to jail. She was released after posting $250 bail. The district attorney declined to prosecute her.

Perez brought this action under 42 U.S.C. § 1983 against the City of Santa Barbara and the four officers who entered her house. She claimed that the officers violated her civil rights by: (1) unlawfully searching her apartment without her consent or a search warrant; (2) falsely arresting her for harboring a fugitive; (3) using excessive force against her prior to and during the arrest; and (4) depriving her of her rights to free speech by preventing her from making the second phone call to the police and by arresting her in retaliation for insulting comments she directed at them. Her first cause of action was against the four police officers, and her second cause of action was against the City on a theory of municipal liability.

The case was tried before a jury. Upon conclusion of Perez's case-in-chief, the court granted the City's motion for a directed verdict and dismissed the second cause of action. The first cause of action was sent to the jury. The jury was provided a special verdict form which segregated issues of qualified immunity from issues of whether Perez's constitutional rights were violated. The jury unanimously found that the police officers did not violate any of Perez's constitutional rights; thus, they failed to reach any issues of qualified immunity.

On appeal, Perez challenges several of the jury instructions. Because we find reversible error in the instructions pertaining to the entry and search of her home, we need not address whether the other instructions were proper. We also conclude that the directed verdict in favor of the City was granted in error.

Jury Instructions[2]

We must determine "whether, viewing the jury instructions as a whole, the trial judge gave adequate instructions on each element of the case to ensure that the jury fully understood the issues." *Los Angeles Memorial Coliseum Comm. v. Nat'l Football League*, 726 F.2d 1381, 1398 (9th Cir.), *cert denied*, 469 U.S. 990, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984). The trial court has broad discretion in formulating instructions and will be reversed only upon a showing of an abuse of discretion. *United States v. Wellington*, 754 F.2d 1457, 1463 (9th Cir.), *cert. denied*, 474 U.S. 1032, 106 S.Ct. 593, 88 L.Ed.2d 573 (1985).

The trial judge gave the following instructions to the jury on the issue of whether the officers violated Perez's constitutional rights by forcibly entering into and searching her residence:

> Under the Fourth Amendment, an arrest warrant is alone sufficient to authorize the entry into a person's home to effect an arrest. If you find that the police officers had reasonable cause to believe that the plaintiff's apartment was *inhabitated by Albert Perez* at the time of the entry and the search, and

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[2]The defendants argue that Perez has waived her right to challenge the instructions, contending that she failed to object to the instructions with sufficient specificity. *See* Fed.R.Civ.P 51. We find that her objections were adequately specific to meet the requirements of Rule 51.

they had reason to believe that Albert Perez was within the apartment, then the entry and search were constitutionally valid.

In determining whether a search is reasonable under the Fourth Amendment, *an inhabited residence is a place of occupancy, and is not restricted to a person's permanent home.*

(Emphasis added.)

The difficulty we have with the instruction lies in the definition of an inhabited residence as merely a place of occupancy. This leaves the jury with the understanding that any sort of temporary occupancy by one person of the home of another can subject that other person to a search of his or her home without a search warrant. We begin our analysis by noting the " 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable," and that "[a]bsent exigent circumstances, [the] threshold [of a home] may not reasonably be crossed without a warrant." *Payton v. New York,* 445 U.S. 573, 586, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980).

In *Payton,* the Court held that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect *lives* when there is reason to believe the suspect is within." *Id.* at 603, 100 S.Ct. at 1388 (emphasis added). However, in *Steagald v. United States,* 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981), the Court made it equally clear that, absent exigent circumstances, an arrest warrant does not justify entry into a *third person's* home to search for the subject of the arrest warrant. A search warrant is needed to protect the rights of the homeowner. *Id.* at 206, 101 S.Ct. at 1644.

In formulating this rule, the Court examined the purposes to be served by the two kinds of warrants. The Court noted, "[W]hile an arrest warrant and a search warrant both serve to subject the probable-cause determination of the police to judicial review, the interests protected by the two warrants differ." *Id.* at 212-13, 101 S.Ct. at 1647-48. The Court noted that an arrest warrant "primarily serves to protect an individual from an unreasonable seizure," while a search warrant "safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police." *Id.* at 213, 101 S.Ct. at 1648. In *Steagald,* the officers relied upon an arrest warrant to enter the home of a third person in which the subject of the arrest warrant was thought to be *Id.* at 212, 213, 101 S.Ct. at 1647, 1648. The Court explained that while the arrest warrant protected the interests of the suspect, "it did absolutely nothing to protect [the homeowner's] privacy interest in being free from an unreasonable invasion and search of his home." *Id.* at 213, 101 S.Ct. at 1648.

[1] In this case, we are faced with a situation which falls between *Steagald* and *Payton.* The officers had an arrest warrant for Albert Perez. They could have legally entered his home to seize him. Yet they used it to enter the home of his sister, Irma, on the apparent belief that Albert had been staying there. If Albert had been an actual co-resident in the apartment, the search would have been legal because the arrest warrant authorizes entry into the suspect's own home, even if that home is shared by others. *See United States v. Ramirez,* 770 F.2d 1458, 1460 (9th Cir. 1958). However, if Albert did not actually reside in the apartment, the search was illegal under *Steagald.*

The question presented to us by this case is what constitutes a person's "home" within the meaning of

Payton and *Steagald*. Here there was some evidence that Albert occasionally spent the night at Irma's home.[3] We must decide whether this temporary occupancy sufficed to make the apartment Albert's home as well so as to allow entry based on simply a warrant for Albert's arrest. The instructions to the jury stated that for purposes of determining Irma's Fourth Amendment rights, the search was legal if the police officers had reasonable cause to believe that Irma's apartment was "inhabited" by Albert at the time of the search. The court further instructed "[a]n inhabited residence is a place of occupancy, and is not restricted to a person's permanent home." The court thus conveyed a clear impression to the jury that a search warrant was not needed if Albert was temporarily staying at Irma's apartment.

[2] We find error in that instruction. Irma's Fourth Amendment rights revolve around her expectation of privacy in her own home. It is unlikely this expectation was lowered substantially when she allowed her brother to stay with her temporarily. She could not have considered Albert a co-resident simply because he occupied her apartment for a short while. The Fourth Amendment's protection against unreasonable searches in a person's home is not diminished by the mere presence of a guest in the home. *Payton* allows entry into the suspect's *actual* home to execute an arrest warrant for the suspect. *See Payton*, 455 U.S. at 603, 100 S.Ct. at 1388 ("[A]n arrest warrant . . . carries with it the limited authority to enter a dwelling in which the suspect *lives* when there is reason to believe the suspect is within." (Emphasis added)). The

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[3]Albert Perez testified in depositions that, prior to the incident, he typically spent the night at Irma's apartment two or three times a month for the purpose of babysitting her children. Irma Perez testified that, when Albert babysat her children overnight, he slept on a sofa, located downstairs in the living room.

Court made it very clear in *Steagald* that the Fourth Amendment does not allow entry into a third person's home without a search warrant. We would impermissibly diminish the protection offered by *Steagald* were we to hold that, for purposes of the *homeowner's* Fourth Amendment rights, the dwelling is the "home" of whoever happens to be staying there.

The defendants assert that "for Fourth Amendment purposes, staying somewhere for a short period of time may be temporarily equivalent to a home." Though this assertion might be true for some Fourth Amendment purposes, it has not force in the case at hand. The privacy interest protected by the Fourth Amendment is personal to the individual asserting it. *See Steagald*, 451 U.S. at 219, 101 S.Ct. at 1651. The cases cited by the defendants involve the constitutional rights of accused persons who temporarily stay in a place. *See, e.g., United States v. Grandstaff*, 813 F.2d 1353 (9th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 119, 98 L.Ed.2d 78 (1987); *Eng Fung Jem v. United States*, 281 F.2d 803 (9th Cir. 1960); *Feguer v. United States*, 302 F.2d 214, 249 (8th Cir.), *cert. denied*, 371 U.S. 872, 83 S.Ct. 123, 9 L.Ed.2d 110 (1962); *United States v. Bulman*, 667 F.2d 1374, 1382-84 (11th Cir.), *cert. denied*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982). The issue in those cases is whether suspects have a reasonable expectation of privacy in a place of temporary occupancy. For these purposes, a hotel room has been held to be the equivalent of a home. *See Eng Fung Jem*, 281 F.2d at 804-05; *Feguer*, 302 F.2d at 249; *Bulman*, 667 F.2d at 1384. Those cases have little to do with this one, where an actual resident of the home asserts Fourth Amendment rights. As the Supreme Court stated in *Steagald*, "The issue here . . is not whether the subject of an arrest warrant can object to the absence of a search warrant [for] . . . another person's home, but rather

whether the residents of that home can complain of the search." *Steagald*, 451 U.S. at 219, 101 S.Ct at 1651.

The privacy interests underlying Albert's and Irma's rights are markedly different. It may be true that if Albert's Fourth Amendment rights were at issue, Irma Perez's apartment might be considered his "residence," even though it was a very temporary place of occupancy. But it simply does not follow that, when analyzing *Irma's* constitutional rights, Albert must be considered a co-resident just because he spent the night there on occasion. On the contrary, when assessing whether the search violated Irma's rights, Albert must be considered a guest in her home if he stayed there only on a temporary basis.

A close reading of *Steagald* suggests that the circumstances in this case are similar to those in *Steagald*. In *Steagald*, the police received an anonymous phone call from an informant who stated that the subject of an arrest warrant — Ricky Lyons — might be reached at a certain phone number. The phone number was listed to a person other than Lyons. *See Steagald, sub nom United States v. Gaultney*, 606 F.2d 540, 543 (5th Cir. 1979) (discussion of facts). During the next four days the police had several other conversations with the informant in which the informant told them that Lyons was at the same location. *See id.* The facts imply that Lyons stayed at the residence for at least a few days, and the Supreme Court noted that the police officers believed Lyons was a guest at the house. *Steagald*, 451 U.S. at 213, 101 S.Ct. at 1648. The Supreme Court, however, did not view the house as Lyons' residence. Similarly, we do not view Irma Perez's apartment as Albert's residence even though he may have occasionally spent a night there.

[3] We hold that the trial judge erred in instructing the jury that, for the purposes of determining Irma Perez's Fourth Amendment rights, her residence could be

considered Albert's home even if he did not permanently reside there. Unless a jury finds that Albert was an actual co-resident of the apartment, and that the police had reasonable grounds for believing Albert was in the apartment at the time, *see Payton*, 445 U.S. at 603, 100 S.Ct. at 1388, the search was in violation of Irma Perez's constitutional rights. The Fourth Amendment right to be secure against warrantless searches within the home is too vital to justify entry without a search warrant to execute an arrest warrant upon a guest in the home, absent exigent circumstances.[4] *See Steagald*, 451 U.S. at 221, 101 S.Ct. at 1652.

Directed Verdict

[4, 5] In her second cause of action, Perez seeks to hold the City liable for her claimed constitutional injury because she attributes the illegal search of her apartment to inadequate training received by the City's officers. A city may be held liable under section 1983 for the constitutional violations of its police officers only if the violation resulted from a municipal "policy or custom." *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). We have held that a practice of gross negligence in training or supervision is a policy giving rise to municipal liability under section 1983. *Bergquist v. County of Cochise*, 806 F.2d 1364, 1370 (9th Cir. 1986). To prevail, the plaintiff must not only establish gross negligence in training but also must demonstrate an affirmative causal link between the inadequate training and the constitutional deprivation. *Id.* at 1369-70.

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[4]The defendants do not claim that there were any exigent circumstances in this case.

The district court granted a directed verdict in favor of the City, which we review *de novo*. *West America Corp. v. Vaughan-Bassett Furniture Co., Inc.*, 765 F.2d 932, 934 (9th Cir. 1985). The evidence must be viewed in the light most favorable to Perez, and all inferences must be drawn in her favor. *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1219 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007, 105 S.Ct. 1874, 85 L.Ed.2d 166 (1985). A directed verdict is appropriate when the evidence permits only one reasonable conclusion as to the verdict. *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986).

[6] Applying these standards, we hold that the trial court erred in granting the directed verdict because the evidence could have permitted a finding of municipal liability. First, the City admitted in its answers to interrogatories that it had no written guidelines on searching a third person's home in which the subject of an arrest warrant is believed to be staying. Instead, the City simply stated that the law of search and seizure is taught on a periodic basis in the police department. We cannot eliminate the possibility that, at trial, a jury could have found the training program so inadequate as to constitute gross negligence on the part of the City. Similarly, we cannot rule out the possibility that such gross negligence, if proved, caused the incident. Two of the officers involved testified that they believed, as a result of their training and indoctrination as to department policy, that a search of a third-party home was legal if the subject of the arrest warrant had been staying temporarily at the residence. Viewing the evidence in the light most favorable to Perez, we believe a jury could have found the City liable for the incident. The district court erred in granting a directed verdict in favor of the City.

CONCLUSION

We reverse the district court's judgment and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX D

No. 86-6663
D.C.#CV 83-7492 JGD

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRMA JEAN PEREZ,
Plaintiff and Appellant,

VS.

WAYNE SIMMONS, et al.,
Defendants and Appellees.

PETITION FOR REHEARING

Appeal from the United States District Court
Central District of California
Honorable John G. Davies, Judge presiding

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No. 86-6663
D.C.#CV 83-7492 JGD

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRMA JEAN PEREZ,
Plaintiff and Appellant,

VS.

WAYNE SIMMONS, et al.,
Defendants and Appellees.

PETITION FOR REHEARING

(F.R.A.P. 40)

I.

INTRODUCTION

In counsel's judgment, a material point of law was overlooked and not clearly addressed in this court's October 26, 1988 Opinion. That issue is the Fourth Amendment probable cause standard to be applied when determining whether a particular location is the home/residence of the subject of an arrest warrant.

In counsel's judgment, any retrial of this case on remand is fraught with uncertainty unless this court modifies its opinion to clarify the probable cause issue. This clarification is necessary because there is confusing and conflicting language on this issue in the Opinion, as now presented.

II

A HOMEOWNER'S FOURTH AMENDMENT RIGHTS ARE NOT VIOLATED WHEN POLICE HAVE AN OBJECTIVE REASONABLE BELIEF THAT THE SUBJECT OF AN ARREST WARRANT RESIDES IN THE HOME AND WAS THERE AT THE TIME OF THE SEARCH.

In this panel's opinion, it italicized those portions of the trial court's Fourth Amendment jury instruction that it believed caused the instruction to be an erroneous statement of the law. (P. 13434) As the court stated:

> "The difficulty we have with the instruction lies in the definition of an inhabited residence as merely a place of occupancy. This leaves the jury with the understanding that any sort of temporary occupancy by one person in the home of another can subject that other person to a search of his or her home without a search warrant."
> Page 13435

> "This court thus conveyed a clear impression to the jury that a search warrant was not needed if Albert was temporarily staying at Irma's apartment."
> Page 13437

This court did not question, nor discuss, the remaining language of the instruction set forth on Page 13434 of the opinion. In particular, the court did *not* criticize that portion of the instruction which read:

> "If you find that the police officers had reasonable cause to believe that the plaintiff's apartment was . . . at the time of the entry and the search, and they had reason to believe that Albert Perez was within the apartment, then the entry and search were constitutionally valid . . ."

In light of that silence, and the opinion's clear language as to what constitutes a "home" for purposes of a search pursuant to an arrest warrant, the defendants would therefore conclude that this panel also held, by implication, that the jury instruction would have been appropriate if written as follows:

> "If you find that the police officers had an objective, reasonable belief that the plaintiff's apartment was also the home or residence of Albert Perez at the time of the entry and search, and that they had reason to believe that Albert Perez was within the apartment at the time of the search, then the entry and search were constitutionally valid."

This conclusion is buttressed by the fact the plaintiff requested a jury instruction with similar language:

> "With respect to Claim #1, the defendant officers have the burden of proving the following facts:
>
> 1. . . .
>
> 2. That they entered plaintiff's home under the *reasonable good faith belief that Albert Perez* was not only there, but also that on that date, he *resided in the same apartment as plaintiff* . . ."
>
> (emphasis added)
> Instruction M, *see* Appellant's Opening Brief, p. 27.

This probable cause instruction requested by both the plaintiff and the defendants looks to the totality of circumstances and objective facts available to the law enforcement officers *at the time* of the search.

There is other language in this court's opinion, however, which conflicts with its silence on the "reasonable cause to believe" language and which appears to indicate that this court is suggesting a probable cause standard

that looks to the "actual" facts as determined *after* the search. For example, at Page 13436 the opinion states:

> "If Albert had been an actual co-resident in the apartment, the search would have been legal because the arrest warrant authorizes entry into the suspect's own home, even if that home is shared by others. . . . However, if Albert did not actually reside in the apartment, the search was illegal under *Steagald*."

In addition the opinion stated:

> "Payton allows entry into the suspect's *actual* home to execute an arrest warrant for that suspect."

– Page 13437

> "Unless a jury finds that Albert was an actual co-resident of the apartment . . . the search was in violation of Irma Perez's constitutional rights."

Page 13439

Defendants believe that the apparent conflict in this court's opinion needs to be clarified by the court adopting the probable cause standard requested by both plaintiff and defendants. We believe that there is sound legal precedent for this position.

In determining whether probable cause existed for the search of a home, based on an arrest warrant, the "reasonable believe" standard has been deemed appropriate by another circuit addressing the issue. *See U.S. v. DeParias,* 805 F.2d 1447, 1457 (11th Cir. 1986) (officers search of third party's home for defendants named in arrest warrant did not violate third party's Fourth Amendment rights where officers "reasonably believed" defendants resided in home and were there at time of search). *See also Llaguno v. Mingey,* 739 F.2d 1186, 1192 (7th Cir. 1984) ("Even assuming, arguendo, that the officers reasonably perceived the Llaguno home as the suspect's

home . . ."); *U.S. v. Clifford,* 664 F.2d 1090 (8th Cir. 1981); *U.S. v. Manley,* 632 F.2d 978 (2nd Cir. 1980); *O'Rourke v. City of Norman,* 640 F.Supp. 1451 (W.D. Okl 1986); (officers reasonably believed that home was daughter's residence). *See also, e.g., Washington v. Simpson,* 806 F.2d 192 (8th Cir. 1986).

The nation's leading scholar and commentator on Fourth Amendment search and seizure issues has argued for the probable cause standard suggested by defendants and approved in *DeParias.* In his treatise, Professor LaFave exhaustively examined the *Payton* and *Steagald* decisions, and the numerous issues raised by those opinions. He has specifically stated, with reference to the particular issue raised by this Petition, that:

> "With *Payton* requiring an arrest warrant for "entry into a suspect's home" to arrest and *Steagald* requiring a search warrant where the arrest entry is at the "the home of a third party", doubtless there will sometimes arise the question of which situation obtains in a particular case . . . when this issue is raised on a subsequent motion to suppress, objecting that a search warrant rather than an arrest warrant was required, surely it ought not be resolved on the basis of information *then* available showing the premises entered were not *in fact* the residence of the person sought to be arrested. Rather, in such circumstances the matter to be decided is whether the entering officers reasonably believed that the place entered was the residence of the person named in the arrest warrant, for were it otherwise the police would be caught in an incredible Catch 22 situation."
>
> LaFave, *Search and Seizure,* (2d Ed.) Section 6.1(b), pages 577-578.

Professor LaFave went on to clearly state that this standard did not suggest that any conclusion the police reached would in fact later be honored. As he stated, the reasonable belief requirement is an application of the traditional probable cause test, and would be measured by objective facts. *Id.,* page 578.

The "reasonable belief" probable cause standard approved by the 11th Circuit and also suggested by Professor LaFave, does not run counter to the United States Supreme Court's holding and language in either *Steagald* or *Payton.* As Professor LaFave stated with respect to *Steagald:*

> "... it is to be doubted that it could be said the agents had a reasonable belief Lyons resided there." *Id.*

Thus, under the reasonable standard, the search of *Steagald's* residence for Lyon would have been illegal because the officers had no objective facts to indicate that Lyon was anything but a visitor. Application of the standard to other reported cases would undoubtedly achieve the same result — i.e., an invalid search for lack of objective facts to support a reasonable belief of residence. *U.S. v. Underwood,* 717 F.2d 482 (9th Cir. 1983) (only objective facts were that suspect got drunk and was staying overnight); *see also, e.g., Bledsoe v. Garcia,* 742 F.2d 1237 (10th Cir. 1984); *U.S. v. Wickizer,* 633 F.2d 900 (6th Cir. 1980). It also appears that this circuit has previously applied a "reasonable belief" standard rather than the "actual facts" test proffered by this panel. In *U.S. v. Ramirez,* 770 F.2d 1458 (9th Cir. 1985), that panel went to great lengths to describe the objective facts known to Special Agent Pack before his search. Those facts included conversations with the landlord confirming that the DeParises did in fact live within the apartment. The panel held that Special Agent Pack had probable cause under

both *Steagald* and *Payton* to search, reasonably believing it was the home of the arrest warrant suspect and that he was within.

A "reasonable belief" standard is also consistent with *Payton.* In that decision, the U.S. Supreme Court did not discuss or adopt an "an actual facts" standard. The pertinent language merely provides that:

> "An arrest warrant . . . carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."
> *Payton,* 445 U.S. 573, 603 (1980)

The Supreme Court did not address the issue of what probable cause standard was to be applied with respect to the determination of whether a suspect is living in a dwelling. Its silence on that issue, combined only with the language "in which the suspect lives", does not justify the adoption of a new probable cause standard.

Historically, with respect to probable cause issues, the court has looked to the totality of circumstances and objective reasonable belief of the law enforcement officer at the time of the event, not thereafter. This is true with respect to the probable cause necessary for a search warrant based on information from an informant, *see Illinois v. Gates,* 426 U.S. 213 (1983); and the probable cause necessary for a misdemeanor arrest, *see Michigan v. DeFillippo,* 443 U.S. 31, 36 (1979); *McKenzie v. Lamb,* 738 F.2d 1005 (9th Cir. 1984). There is no express language in *Payton* suggesting that any different standard should be applied for residential searches involving arrest warrant suspects.

The Supreme Court has taken a common sense approach to defining probable cause.

> "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act."

Brinegar v. U.S., 338 U.S. 160, 175 (1949). It is inconsistent with that approach, and contrary to the very meaning of probable cause, to apply a test that looks only to the "actual facts" as they are collected and determined after the search. The Fourth Amendment protects only against "unreasonable" searches and seizures. It does not adopt or suggest an absolutist standard.

Defendants would argue that in determining the legality of a *Payton* search, a standard that looks to an officer's objective reasonable belief as to the residence of the warrant suspect, based on the totality of the circumstances at the time of the search, is the test most consistent with the spirit of the Fourth Amendment and Supreme Court precedent.

III

CONCLUSION

Defendants would respectfully request this court to grant the Petition or, in the alternative, to modify its opinion to clarify the issue presented by this petition.

Dated: November 7, 1988

Respectfully submitted,
STEVEN A. AMERIKANER,
City Attorney

By DAVID K. HUGHES
Assistant City Attorney
Attorney for all defendants,
for purpose of this Petition.

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 86-6663
D.C. No. CV-83-7492-JGD

IRMA JEAN PEREZ,
Plaintiff-Appellant,

v.

WAYNE A. SIMMONS; JAMES NALLS; THOMAS MILLER; MARK MESKE; and CITY OF SANTA BARBARA,
Defendants-Appellees.

ORDER

FILED DEC. 21, 1988
Cathy A. Catterson, Clerk
U.S. Court of Appeals

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before: HUG, ALARCON, and KOZINSKI, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing filed by appellees on November 8, 1988.

The petition for rehearing is hereby DENIED.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 13, 1989, I served the within Petition for Writ of Certiorari in re: "Wayne A. Simmons, James Nalls, Thomas Miller, Mark Meske, City of Santa Barbara vs. Irma Jean Perez" in the United States Supreme Court, October Term 1988 No.....;

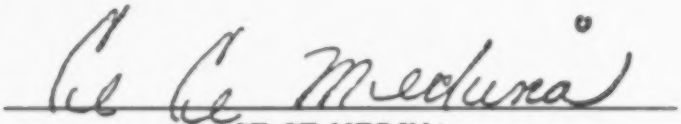
On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

John M. Sink
1114 State Street, Suite 211
Santa Barbara, California 93101

All parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on February 13, 1989, at Los Angeles, California.



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No. 88-1366

Supreme Court, U.S.
FILED
MAR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

Wayne A. Simmons, James Nalls, Thomas Miller, Mark Meske and The City of Santa Barbara,

Petitioners,

vs.

Irma Jean Perez,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John M. Sink
1114 State Street, Suite 211
Santa Barbara, CA 93101
Telephone: (805) 963-4266
Lawyer for Respondent

26pp

QUESTIONS PRESENTED

1. Where a municipality trains its police officers to make forcible searches of third-party homes, without search warrants, to find fugitives for whom they have only arrest warrants, based solely on the officer's hunch that the fugitive can be found within, can the municipality be liable under 42 U.S.C. § 1983 for an illegal search caused by such erroneous training?

2. Should *Steagald v. United States*, 451 U.S. 204 (1981), be overruled?

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ARGUMENT

1. CERTIORARI SHOULD NOT BE GRANTED ON THE FOURTH AMENDMENT ISSUE BECAUSE: (1) THE APPLICABLE LAW WAS SETTLED BY STEAGALD; (2) THE NINTH CIRCUIT DECIDED THIS CASE CORRECTLY; AND (3) THE ELEVENTH CIRCUIT CASE IS SUFFICIENTLY AMBIGUOUS THAT UNSUPPORTABLE ASSUMPTIONS ARE NECESSARY IN ORDER TO READ IT AS CONFLICTING WITH *STEAGALD* 10

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CONCISE STATEMENT OF THE CASE

1. *A Note on the Pleadings.* Defendants are incorrect in suggesting [Petition for Cert., 2] that plaintiff "generally alleged" a policy of inadequate training and negligence. Plaintiff's allegations regarding the City of Santa Barbara's policies and customs addressed in detail the refusal to provide guidelines, policies or supervision, and the overtly wrong-headed officer training which were proved at the trial [Amend. Comp., ¶¶ 3(b)(ii), (iii), (iv), (v) and (ix); see Petition for Cert., App. A, 6a-8a].

2. *Irma Perez' Residence and Family (Plaintiff's Evidence).* On March 8, 1983, plaintiff Irma Jean Perez lived with her three children: her sons Benny (then 13) and Michael (10) and her daughter Denica (4), in a three-bedroom apartment at 13 South Soledad Street, Apt. 3, Santa Barbara, California. They had lived there for several years. Her bedridden father, Eloy Perez, who resided in Texas, had been staying with her for several months. Irma Perez had a bedroom to herself. Her daughter had a bedroom. The two boys alternated, one sharing a bedroom with their grandfather and the other sleeping downstairs on the living room sofa [2 RT 62:15-65:7].

Irma Perez' immediate family includes three brothers and two sisters, all adults and residing in Santa Barbara. Her older brother, Albert Perez, had for many years gone a different way from the rest of the family. He had done time in prison, and had numerous contacts with the law, including an ongoing relation with his probation officer and with the Santa Barbara Police Department. In March of 1983, Albert lived across town from Irma Perez, at 1404 Bath Street, with their mother and two sisters. Albert had not lived in the same household with Irma Perez since she established her own home, years before these events. He had never lived with her at 13 South Soledad Street, and did not live there on March 8, 1983. Albert babysat for Irma from time to time, but only when she asked him; these were the only times he was permitted to spend the night in her apartment. This was a City Housing Authority apartment; under applicable rules, it was leased to Irma Perez for occupancy only by her and her three children. She would lose it if anyone else resided there [*Perez,* 2 RT 103:23-105:4, 108:1-21].

3. *The Narcotics Section is Reminded of Albert Perez (Defendants' Testimony).* On March 8, 1983, the Narcotics Section of the Santa Barbara Police Department comprised defendants Nalls (sergeant in charge), Simmons and Miller. They all knew Albert Perez. The department had received two arrest warrants for Albert during the past year, one of which they had served, and one (issued five months before, for failing to make a court appearance) they had not. They had been to his address at 1404 Bath Street several times, but he was not there.

On the morning of March 8, 1983, Albert Perez' name was mentioned at an informal police briefing; the officers were aware of him, but not specifically looking. They would keep an eye out for him. Their routine that day included cruising areas of Santa Barbara where they might encounter persons addicted to controlled substances, since these people emerge daily to go "from point to point" for necessary purchases. They cruised in the vicinity of Soledad Street, though not looking for Albert Perez; nor had they sought him there in connection with the previous arrest warrant [*Nalls,* 3 RT 72:16-73:16, 75:14-84:19].

4. *Albert Sighted and Lost/ An Inquiry Regarding His Sister's Address (Defendants' Testimony).* Shortly after noon, defendants Nalls, Simmons and Miller (plainclothes, unmarked vehicle) were driving on a cross street through Soledad Street. As they eased through the intersection, they saw Albert Perez walking toward them on Soledad Street (in the same block as the apartment complex where Irma Perez lived). Albert was about 100 feet away. Sgt. Nalls observed, "There's Albert." Defendant Simmons (driving) slowed, continued through the intersection, and let defendant Miller out. Nobody else got out. There was just no place to park. Simmons waited for an opportunity to make a U-turn, did so, and located a parking place. The officers then made a walk-through search of the apartment complex where Irma Perez lived. Seeing no trace of Albert, they talked things over. Defendant Miller remembered that on a prior occasion he and another detective had met Albert and talked to him in this area. Defendant Nalls remembered that once, in 1980, he had been present when somebody else

arrested Albert on Soledad Street, in front of this very apartment complex [*Nalls*, 3 RT 85:12-93:10].

Sgt. Nalls also remembered that when Albert was arrested in 1980, he had a relative who lived in this apartment complex, but Nalls could not remember which apartment. Defendants Miller and Simmons were unable to help as to the address, but Sgt. Nalls remembered the name — Irma Perez. They decided that since they had not found Albert, he must have gone to Irma Perez' apartment. Sgt. Nalls decided to have one of the officers at the police station look up Irma Perez' address. He used the radio in his vehicle to ask the dispatcher where she lived. But when the answer was delayed, all three officers got back in their vehicle and drove several blocks away to a pay telephone. They left no one to watch the apartment complex while they were gone, nor did they request that any other officer be sent there to watch it. They were gone 10 or 11 minutes. They learned that Irma Perez' residence was Apt. 3. Sgt. Nalls had no intention of getting a search warrant. The need for one "just didn't occur to me" [*Nalls*, 3 RT 92:20-94:25, 96:5-16, 97:22-99:3, 102:4-22].

On the way back to the apartment complex, Sgt.Nalls radioed for the assistance of a uniformed officer. They were all in plainclothes; a uniformed officer would "validate who we were as police officers not just someone off the street demanding or asking to go into someone's home" [*Nalls*, 3 RT 105:1-8, 112:3-10].

Defendant Miller testified that, while waiting for the black-and-white to arrive, he walked back into the apartment complex and encountered an acquaintance, one Billy Roberts. Defendant Miller testified (limited purpose, state of mind) that Mr. Roberts told him that Albert Perez lived in apartment #3 (Irma Perez' apartment), and that he (Mr. Roberts) had not seen Albert Perez recently [*Miller*, 4 RT 98:6-100:10].

5. *A Different Recollection.* Mr. Roberts testified that on March 8, 1983, he resided with his mother at 21 South Soledad Street, and had been living there eight or nine years. He knew Irma Perez well. He played backgammon with her and sometimes watched her children while she was at work. He also knew that once in a while Albert Perez came to see his sister.

To his knowledge, Albert Perez did not live there. He said he met Albert Perez that day while walking on Soledad Street, about a block north of Irma Perez' apartment complex. He spoke to Albert and kept going. Two officers (whom he identified as defendants Simmons and Nalls) stopped him and asked him if he knew Albert Perez. He told them he did. They asked if Albert Perez lived in apartment #3 and he told them no, adding that he had just seen Albert Perez going down the street a few minutes before [*Roberts,* 2 RT 173:3-178:6].

6. *Arrangements for a Spontaneous Search.* It was not necessary for Sgt. Nalls to give defendants Simmons and Miller any kind of detailed plan for the search of Irma Perez' apartment because they had been doing arrest warrant searches for years, and everybody knew his job [*Miller,* 4 RT 80:20-25]. Nalls would go around to the rear door, in case Albert tried to escape by that route. When defendant Meske arrived in the black-and-white, Nalls told Meske to go to the front door with Miller and Simmons. They were to get Irma Perez' consent if possible, and if she refused admission, enter by force. Once inside, Meske (the only one in uniform) was to "control" anyone in the apartment [*Nalls,* 3 RT 115:7-117:3].

7. *The Fact Situation Immediately Prior to Entry.* Sgt. Nalls did not know of anyone who actually saw Albert Perez enter the apartment complex while being chased; he had not talked to anybody who claimed to have seen Albert go into Irma Perez' apartment, or claimed to have seen him inside, e.g., through a window. Before initiating the forcible entry into Irma Perez' apartment, he had not made any check with the City Housing Authority to find out whether any other name was on the apartment besides hers [*Nalls,* 4 RT 13:7-21]. The same was true of defendant Miller [*Miller,* 4 RT 94:10-23]. There was no claim or evidence that defendants Simmons or Meske had made any such inquiry. Defendant Meske (the last to arrive) assumed ("inferred") that somebody must have seen Albert Perez go into the apartment, but no one told him that [*Meske,* 5 RT 41:3-9].

8. *Santa Barbara Training Policies and Customs\ the State of Training of the Defendant Officers at the Time of Entry.* Defendant the City of Santa Barbara admitted that prior to

March 8, 1983, and throughout the whole period during which it employed the defendant officers, the Police Department had no written policy regarding the circumstances under which police officers could conduct forcible searches of private residences without search warrants, based only on the fact that they were looking for a person for whom an arrest warrant had been issued [Response of defendant the City of Santa Barbara to plaintiff's written interrogatory #7(B); plaintiff's Ex. 7; Excerpts, pp. 73-74; please see APPENDIX A hereof, p. A-1]:

> "The City and its police department had no written policy since the law of search and seizure is changing constantly. The law of search and seizure is taught by the police department on a periodic basis, as a part of the police department's monthly training plan."

Similarly, during the officer employment period, the City conceded that neither it nor anyone acting on its behalf provided Santa Barbara police officers with any written guidelines concerning the warrantless entry or search of a private residence over the objections of the householder, or concerning constitutional provisions or other rules applicable to warrants, or to exigent circumstances justifying warrantless searches [Response of defendant the City of Santa Barbara to plaintiff's written interrogatory #8; plaintiff's Ex. 7; Excerpts, pp. 77-78; please see APPENDIX A hereof, p. A-2].

Finally, during that period, the City had no written policy requiring police officers to file complaints against other officers for conducting unlawful searches of private homes, or using unlawful force or violence on persons being questioned, detained or arrested [Response of defendant the City of Santa Barbara to plaintiff's written interrogatory #7(D); plaintiff's Ex. 8; Excerpts, pp. 75-76; please see APPENDIX A hereof, p. A-3].

As of March 8, 1983, defendant Nalls had been supervisor of the Santa Barbara Police Department Narcotics Detail for about three years. During this time he was involved in personally executing about 200 to 300 search warrants. During that same period, he estimated that he was involved in perhaps

200 additional searches of premises, based on arrest warrants, some of which involved third-party homes. Defendant Nalls said that prior to his search of Irma Perez' apartment without a search warrant on March 8, 1983, looking for someone for whom he had an arrest warrant, he had been involved in "maybe 200" similar searches. He testified that he was not required to submit any reports with respect to third-party warrantless searches, and that his supervisor did not review such searches with him [*Nalls,* 5 RT 151:1-152:13; 6 RT 32:8-33:22].

Defendant Simmons testified that his own involvement in arrest warrant searches during the period leading up to March 8, 1983 was not significantly different from that of defendant Nalls [*Simmons,* 6 RT 35:10-36:6].

Even Officer Meske, a uniformed officer not involved in the Narcotics Detail, had been involved in two or three residential searches made without a search warrant, on the basis that an arrest warrant had been issued for a fugitive whom he thought to be inside. He was not later required to make any special report to any superior regarding these warrantless searches, and to the best of his knowledge the department made no inquiries as to whether circumstances had justified the searches [*Meske,* 5 RT 41:10-42:12].

Defendant Nalls confirmed that on March 8, 1983 the Santa Barbara Police Department had no written procedure, or guidelines, on the subject of legal requirements for warrantless searches of residences.

The Santa Barbara Police Department's monthly training plan included weekly training bulletins on various law enforcement subjects ranging from vehicle stops to search and seizure law, which were distributed to the officers; occasional training videotapes; a departmental subscription to Law Enforcement Legal Reporter, one issue of which apparently referred to *Steagald v. United States*, and briefings by a deputy district attorney who worked closely with the Narcotics Section [*Nalls,* 5 RT 158:1-166:20]. As a result of this training, defendant Nalls believed on March 8, 1983 that if Albert Perez was staying at Irma Perez' apartment, that made her apartment his "home," and they did not need a search warrant [*Nalls,* 3 RT 147:9-152:3, 153:6-154:22;4 RT 10:18-11:10]. He concluded,

based on his training by the department, that "residence" was wherever a person was staying, i.e., a boat, hotel, mobile home or motor home — just where the person happened to be spending the night. He concluded that a person like Albert Perez, who sleeps around, who sleeps with a girlfriend for a couple of nights and then somewhere else for a couple of nights, and has enough friends to repeat this process, no more than two or three nights in any one place, could actually have ten different "residences" in a month, for purposes of an arrest warrant search. He believed, based on his training, that if he were looking for Albert and did not have a search warrant, he could simply go to wherever Albert was staying; and that this procedure was the policy of the Santa Barbara Police Department, expressly based on the *Steagald* case [*Nalls,* 3 RT 155:9-158:20; 4 RT 10:18-11:10]. He concluded that his basic problem was simply to find out where Albert was staying [*Nalls,* 4 RT 12:6-13]. The need for a search warrant "just didn't occur to me" [*Nalls,* 3 RT 102:21-22].

Defendant Simmons, who received the same training, said that it was his understanding of applicable law and departmental policy that officers had a right to enter and search a residence "when they had a reasonable belief that a probation violator was living or staying at the residence," and that given the facts available to the officers in the Perez case, their search of Irma Perez' apartment without a search warrant was within the policy of the Santa Barbara Police Department [Response of defendant Simmons to plaintiff's written interrogatory #6; Excerpts, pp. 79-80; please see APPENDIX A hereof, p. A-2].

9. *A Forcible Entry Without a Search Warrant.* When the police knocked on her door, Irma Perez was at home with her father and daughter; Denica had the chicken pox, and was wearing only a T-shirt; she was downstairs with her mother. Without opening the door, Irma Perez asked who was there.The defendants identified themselves as police, and said they were looking for Albert Perez. She said, "Well, Albert doesn't live here." They said they had a "warrant for his arrest." She asked them to pass the warrant through the mail slot, but they insisted that they had to hand it to her. When she opened the door enough for them to do so, they threw it open by main force,

pushed her aside and proceeded to search her house. [*Perez,* 2 RT 65:8-66:17, *Miller,* 4 RT 82:16-83:1, *Simmons,* 4 RT 124:6-125:8]. Defendant Simmons said that Irma Perez tried to block him from entering, but that, assisted by officer Meske, he shoved her aside [*Simmons,* 4 RT 125:9-126:12]. She was protesting their entry and asking them to leave her house. He told her to "shut up." She insisted that they had no right to be in her house, and should leave [*Perez,* 2 RT 66:18-67:8]. She walked toward the sofa where Denica was resting. Officer Meske, walking behind her, grabbed her and threw her into a wooden rocking chair, hard enough to make it slide against the wall. Meske then pinned her in the chair, putting his hands on top of her wrists to pin them to the arms of the chair, and kneeling on her, with one leg across her thighs, putting his weight on her. She remonstrated. After a short time, he let her up [*Perez,* 2 RT 69:4-75:24].

10. *A Call for Police Assistance Interrupted by an Immediate Arrest.* When defendant Meske released her, Irma Perez walked across the room to a wall telephone located in her kitchen and dialed 911. The dispatcher's tape [plaintiff's Ex. 6, in evidence; Excerpts, p. 71] contains the following:

911: 911

Perez: Yeah, I was wondering ... I'd like to speak to somebody about policemen harassing me ... who to speak to or whether, what can I do about it.

911: You want to complain about the officers?

Perez: Yes, I sure do.

911: Call the non-emergency line, please. That number is 963-3616.

Perez: Thanks.

At about this time, defendants Simmons, Nalls and Miller, having ascertained that Albert Perez was not in the apartment, and having interrogated Eloy Perez as to whether he knew his son was a wanted man, had come downstairs and were in the act of leaving her apartment; Simmons and Meske were almost to the front door. At that point, Simmons was not intending to arrest Irma Perez, although he thought there was

"strong evidence suggesting she had committed a violation" [*Miller*, 4 RT 83:21-86:24; *Simmons*, 4 RT 137:9-22].

Irma Perez, having completed her first call, was about to make the second call when, without warning, one of the officers came up behind her and suddenly cut her off by depressing the receiver. She was angry. She threw the instrument on the floor and demanded to know why he had done that. Without answering, he immediately spun her around, facing the wall, threw her up against the wall, handcuffed her behind her back in a very painful way, and told her she was under arrest "for harboring a fugitive" [*Perez*, 2 RT 79:1-81:4]. The officer was defendant Simmons [*Nalls*, 3 RT 128:7-132:13]. Defendant Simmons testified (deposition) that he arrested Irma Perez to prevent her from making the phone call, because that would be "an additional crime," i.e., "making a false report basically" [*Simmons*, 4 RT 140:17-141:9].

11. *The Long Way to Jail.* They handled her out the door, through gathering neighbors, to the police car. When leaving the apartment, one of the officers told Irma Perez she was an unfit mother and threatened to take her daughter away from her; Denica heard the threat, and later confronted her mother, in tears, with questions about what it meant. When they got to the black-and-white, the defendants "opened the door and threw me inside," so that her right shoulder slammed against the door frame[*Perez*, 2 RT 81:21-88:3, 97:12-99:20].

Instead of taking her directly to the County Jail for booking, they took her first to the Santa Barbara police station, where they left her alone, in handcuffs, for about 20-30 minutes, and then took photographs of her arms. [*Perez*, 2 RT 88:11-91:10] They finally took her to jail, where her booking was completed about 6:15 p.m. [Plaintiff's Exhibit 2, in evidence, Booking Record; Excerpts, p. 66]. After posting bail (premium, $250), Irma Perez was released, and got back to her apartment between 11:00 p.m. and midnight [*Perez*, 2 RT 95:13-96:25].

ARGUMENT

1. CERTIORARI SHOULD NOT BE GRANTED ON THE FOURTH AMENDMENT ISSUE BECAUSE: (1) THE APPLICABLE LAW WAS SETTLED BY *STEAGALD*; (2) THE NINTH CIRCUIT DECIDED THIS CASE CORRECTLY; AND (3) THE ELEVENTH CIRCUIT CASE IS SUFFICIENTLY AMBIGUOUS THAT UNSUPPORTABLE ASSUMPTIONS ARE NECESSARY IN ORDER TO READ IT AS CONFLICTING WITH *STEAGALD*

A. *The Need to Ask the Question Right.* Petitioners define the "Fourth Amendment issue" which they have selected for this Court's review as whether *Payton v. New York*, 445 U.S. 573 (1980), should be "clarif[ied]" as to "what probable cause standard is to be applied with respect to the determination of when a suspect is living in third-party dwelling"; and whether this standard is to be applied to "actual residence" [Petition for Cert., 5-6]. The question posed is inappropriate since it presupposes the determination of the person who should apply the probable cause standards to the question of actual residence versus suppositious residence, and by implication determines this person to be a policeman and not a magistrate. By dressing up their issue in this way, petitioners can argue for a mantle of "good faith" immunity for the officers in this new decision-making field.

The real question here is whether a search warrant was necessary, i.e., who should determine whether this search should have been allowed, the officers or a magistrate? The case that petitioners really want to change is not *Payton*, but *Steagald v. United States*, 451 U.S. 204 (1981), which requires a search warrant on these precise facts.

B. *A Matter of Perspective.* It is refreshing to consider this case just from the standpoint of the City of Santa Barbara, setting aside for the moment petitioners' assertion that the officers are entitled to a "good faith defense" for an elective warrantless search. Municipalities are not entitled to any defense arising from the good faith of their employees; they have no discretion at all to violate the Constitution or federal statutes. *Owen v. the City of Independence*, 445 U.S. 622, 644, 649 (1980). From the City's perspective, the relevant

questions are whether a search warrant was necessary, and if so, whether the warrantless search resulted from a policy or custom of the City.

The Fourth Amendment says:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In *Steagald v. United States*, 451 U.S. 204 (1981), *supra*, the Court used the following language in holding that a third-party home could not be searched without a search warrant by officers who held an arrest warrant only, for a fugitive whom they suspected of staying there overnight [445 U.S. 212-213]:

> [W]hile an arrest warrant and a search warrant both serve to subject the probable cause determination of the police to judicial review, the interests protected by the two warrants differ. ...
>
> Thus, whether the arrest warrant issued in this case adequately safeguarded the interests protected by the Fourth Amendment depends on what the warrant authorized the agents to do. To be sure, the warrant embodied a judicial finding that there was probable cause to believe that Ricky Lyons had committed a felony, and the warrant therefore authorized the officers to seize Lyons. However, the agents sought to do more than use the warrant to arrest Lyons in a public place or in his home; instead, they relied on the warrant as legal authority to enter the home of a third person based on their belief that Ricky Lyons might be a guest there. Regardless of how reasonable this belief might have been, it was never subjected to the detached scrutiny of a judicial officer. Thus, while the warrant in this case may have protected

> Lyons from an unreasonable seizure, it did absolutely nothing to protect petitioner's privacy interest in being free from an unreasonable invasion and search of his home. Instead, petitioner's only protection from an illegal entry and search was the agent's personal determination of probable cause.

The requirement for a residential search warrant derives from two facts: (1) a particular location is somebody's residence; and (2) the government proposes to search that residence. In this case, the only thing the defendants really knew about 13 South Soledad Street, Apt. 3, was that it was Irma Perez' residence. That is how they identified the place they wanted to search — they asked headquarters for the address of Irma Perez, Albert's sister. They certainly proposed to search her residence. A search warrant was prima facie necessary.

It is familiar law that the two exceptions to the search warrant requirement are exigent circumstances and consent. Nobody claims this was a consensual search; and none of the defendants contended at the trial that the officers were in hot pursuit or that the search was justified by exigent circumstances. Defendants requested no instructions on exigent circumstances, presented no evidence on that subject, made no such jury argument, and never raised the issue on appeal. Their abandonment of exigent circumstances was understandable, since the officers had not seen Albert go into Irma Perez' apartment, or even into that apartment complex, had not talked to anyone who had claimed to have seen Albert go there, or to have seen him inside. Moreover, the officers had collectively abandoned the scene to go several blocks away to find a pay phone. They were not in pursuit; they no longer had their quarry in sight. They simply had a hunch that Albert Perez could be found in his sister's apartment, wherever that was, and they believed (from their training) that if he were found there that fact would automatically make her apartment his "residence." Defendant Nalls' erroneous training re *Steagald* [discussed above] misled him so much that it "never entered [his] head" to ask for a search warrant, although courts were open.

A search warrant was required so a magistrate, not a policeman, could decide *in light of the given fact that Irma Perez*

resided at 13 South Soledad, Apt. 3, whether there was probable cause to believe that: (1) Albert Perez actually resided in Irma Perez' apartment, as a *co-resident with her;* as distinguished from being present as a guest; and that (2) he was presently in that apartment.

We are aware of no case which extends the rule of *United States v. Leon*, 468 U.S. 897 (1984), re officer reliance on the validity of a search warrant actually issued by a magistrate, to mean that an officer's "good faith" opinion that a search warrant is not necessary can excuse and validate a warrantless, and otherwise unconstitutional search. Such a case would nullify the Fourth Amendment.

C. *The Court Below Decided This Case Correctly.* The Ninth Circuit opinion was properly applied on *Steagald v. United States*, 451 U.S. 204 (1981). The Ninth Circuit was not required to make new law, and made none. If this Court granted certiorari, we believe it would probably arrive at the same result. The expenditure of judicial time would not be justified unless there were a patent conflict between the Ninth Circuit and some other circuit on this point. The petitioning hand points without wavering at *United States v. De Parias*, 805 F.2d 1448 (11th Cir. 1986). That confidence seems rash.

D. *The De Parias Opinion is Not Sufficiently Fleshed Out Even to Create a Conflict.* Petitioners' Eleventh Circuit issue rests entirely on two paragraphs [805 F.2d at 1457]:

> Ramirez argues that the entry of the FBI agents into his Los Angeles apartment violated his Fourth Amendment rights because the FBI possessed only arrest warrants for Julio and Julita De Parias. An arrest warrant alone is an insufficient basis for searching a third party's home for those named in the warrant. *Steagald v. United States*, 451 U.S. 204, 213, 101 S.Ct. 1642, 1648, 68 L.Ed.2d 38 (1981). Therefore, Ramirez argues, the FBI needed a search warrant to enter the apartment.
>
> Ramirez's argument rests on the assumption that the apartment was also not the

> residence of Julio and Julita De Parias, for 'an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.' *Payton v. New York*, 445 U.S. 573, 603, 100 S.Ct. 1371, 1388, 63 L.Ed.2d 639 (1980). The district court's determination that the FBI agents reasonably believed that Julio and Julita De Parias resided in the apartment and were in there at the time is not clearly erroneous. The apartment manager had informed the FBI agents that the De Pariases lived there and that they were home if a certain car was parked in front of the apartment. That car was present when the FBI agents arrived. Therefore, the arrest warrant alone authorized their entry.

For all that appears in the opinion, the Eleventh Circuit may have adopted findings by the court below that: (1) the apartment was not Ramirez' residence, but was the residence of Julio and/or Julita De Parias; and (2) the FBI agents were not on inquiry, and had no information indicating that the apartment was Ramirez' apartment or that he might be found there. In that case, *Steagald v. United States*, 451 U.S. 204 (1981), would not apply, and entry for purposes of arresting Julio and/or Julita De Parias would have been proper under *Payton v. New York*, 445 U.S. 573 (1980).

Consequently, the holding in *United States v. De Parias*, 805 F.2d 1448 (11th Cir. 1986), is far from clear,and in insufficient to give rise to a conflict with the Ninth Circuit finding in the present case, or with *Steagald v. United States*, 451 U.S. 204 (1981).

2. CERTIORARI SHOULD NOT BE GRANTED ON ACCOUNT OF *CITY OF CANTON, OHIO V. HARRIS*, SINCE THE FACTS SUPPORTING MUNICIPAL LIABILITY IN THE PRESENT CASE WOULD ALSO SUPPORT LIABILITY UNDER *CANTON*

Sgt. Nalls was in charge of this narcotics detail for three years before this incident, during which time he was personallyinvolved in some 400 to 500 searches. He had, without restriction to that three-year period, been involved in about 200 residential searches similar to the one in this case, i.e., purisuant to arrest warrants [*Nalls*, 5 RT 151:19-152:13]. He and the other officers were very much in need of instruction regarding warrantless searches of third-party homes based solely on an arrest warrant. The City of Santa Barbara declined to promulgate any policy on that subject, either written or unwritten. It had no policy of supervising searches of third-party homes, or reviewing records of those searches, thus foreclosing any possibility of learning the extent of such searches or even which officers might be in need of retraining.

More importantly under *City of Canton, Ohio v. Harris*, 57 U.S.L.W. 4270 (U.S. Feb. 28, 1989), the City embarked on an affirmative training program involving written materials which the officers could discuss among themselves, and occasional sessions with district attorneys, as a result of which (according to Sgt. Nalls) he felt certain that wherever a person like Albert Perez spent the night, that place could be searched without a search warrant. He believed that Albert resided wherever he slept, on a boat or anywhere, and that in view of his sleeping around with girlfriends, he could have as many as ten "residences" in a month. The warrantless search of plaintiff's apartment was concededly a direct result of this training program. That is a clear case of municipal liability, whether the standard is called gross negligence or deliberate indifference.

CONCLUSION

Certiorari should be denied. If it is granted for the purpose of elucidating *City of Canton, Ohio v. Harris,* 57 U.S.L.W. 4270 (U.S. Feb. 28, 1989), regarding municipal liability under 42 U.S.C. § 1983, this case should be scheduled for full briefing.

DATED: March 24, 1989

Respectfully submitted,

/s/ JOHN M. SINK
JOHN M. SINK

APPENDIX A

Plaintiff's Exhibits Nos. 7, 8, 9 and 10, in evidence [Excerpts, pp. 73-80, 87-88], posed the following questions and elicited the following responses:

"INTERROGATORY NO. 7: With reference to the time period beginning on the date of the earliest job application mentioned in your answer to the preceding interrogatory [the job applications of defendants Simmons, Nalls, Miller and Meske] and ending on March 8, 1983 [hereinafter referred to as the OFFICER EMPLOYMENT PERIOD], state fully the policy of the Santa Barbara Police Department, including full descriptions of any documents which then embodied or from time to time have embodied said police policies, with respect to the following subjects:

"....

"b. Under what circumstances Santa Barbara police officers are permitted to search private residences by forcible entry and without a warrant, on the ground that the officers are looking for a person for whom an arrest warrant has been issued, where the person sought does not reside at the premises to be searched, and where the officers have not verified the presence of such person on such premises at the time of the search."

[Response to Interrogatory 7b]: "The City and its police department had no written policy since the law of search and seizure is changing constantly. The law of search and seizure is taught by the police department on a periodic basis, as part of the police department's monthly training plan." [Excerpts, pp. 73-74]

"d. Whether Santa Barbara police officers should be indoctrinated to file administrative or criminal complaints against other officers for conducting unlawful, forcible searches of private homes, or for using unlawful force or violence on persons being questioned, detained or arrested; and whether officers should forcibly intervene to prevent such conduct."

[Response to Interrogatory 7d]: "The City is informed and believes and on that basis answers that it is unaware of any such written policy." [Excerpts, pp. 75-76]

"INTERROGATORY NO. 8: "During the OFFICER EMPLOYMENT PERIOD ... state whether you or anyone acting on your behalf has provided Santa Barbara police officers with written guidelines concerning the warrantless entry or search of a private residence over the objections or the homeowner or other occupant, constitutional provisions or other rules concerning warrants, or exigent circumstances justifying warrantless searches; and if so, describe such guidelines and state their content in full ...."

[Response to Interrogatory No. 8] "No." [Excerpts, pp. 77-78]

"INTERROGATORY NO. 6 [to defendant Wayne A. Simmons]: State your understanding, as of March 8, 1983 (your state of mind on that date) of what the policy of the Santa Barbara Police Department was on that date, with respect to the circumstances under which Santa Barbara police officers were permitted to search private residences without a search warrant, over the objections of the householder or occupant, on the ground that the officers were looking for a person for whom an arrest warrant had been issued, with special reference to whether the officers were required to verify that that person sought to be arrested then resided at the premises to be searched, and whether the officers were required to verify that the person sought to be arrested was actually present on such premises at the time of the search."

[Response to Interrogatory No. 6] "It was my opinion on March 8, 1983, that given the facts available to us in the Perez case, our actions were within the policy of the Santa Barbara Police Department. It was my understanding of the applicable law and departmental policy, that police officers had the right to enter and search a residence, when they had a reasonable belief that a probation violator was living or staying at the residence." [Excerpts, pp. 79-80]

"INTERROGATORY NO. 7 [to defendant Wayne A. Simmons]: With reference to your answer to the preceding interrogatory, state:

"a. Whether your answer is based in whole or in part on some written guideline or written policy of the Santa Barbara Police Department; if so, state fully and in detail the provisions of such written guideline or written policy …."

[Response to Interrogatory 7a] "It is my belief that a written policy or written guideline regarding specific information in the preceding interrogatory does not exist."

"b. State the name, address and telephone number of each person who has an original or copy of such written guideline or policy."

[Response to Interrogatory 7b] "None."

"c. Whether your answer is based in whole or in part on any unwritten guideline or policy of the Santa Barbara Police Department; if so, state fully and in detail the provisions of such unwritten guideline or policy."

[Response to Interrogatory 7c] "It is my belief that an unwritten guideline or policy of the Santa Barbara Police Department regarding specific information in the preceding interrogatory dos not exist."

"d. State the name, address and telephone number of each person who has or claims to have knowledge of such unwritten guideline or policy."

[Response to Interrogatory 7d] "None."

[Excerpts, pp. 87-88]

CERTIFICATE OF SERVICE

JOHN M. SINK hereby states:

1. I am a member of the Bar of this Court (No. 71479).

2. A copy of this Opposition to Petition for Writ of Certiorari was, to my knowledge, served on the opposing parties by mailing three copies thereof in sealed envelopes with first class postage fully prepaid in the United States Mail in Santa Barbara, California, addressed as follows:

Steven A. Amerikaner, City Attorney
David K. Hughes, Assistant City Attorney
P. O. Drawer P-P
Santa Barbara, CA 93102

Kristofer Kallman, Esq.
800 Presidio
Santa Barbara, CA 93101

3. The Petition for Writ on Certiorari was received by my office on February 15, 1989. Since the 30-day period for serving a response therefore (to and including March 17, 1989) was extended one week, to and including March 24, 1989, this service by mail was timely under Rule 22.1.

DATED: March 24, 1989.

JOHN M. SINK

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA BARBARA)

On this 24th day of March, 1989, before me, a Notary Public in and for the State of California, personally appeared JOHN M. SINK, personally known to me to be the person whose name is subscribed to this instrument, and acknowledged that he executed it.

WITNESS my hand and official seal.

OFFICIAL SEAL
DOROTHY S. CLAPP
NOTARY PUBLIC - CALIFORNIA
SANTA BARBARA COUNTY
My Comm. Expires June 12, 1989